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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 355

CORBIN D. HUGHES, ADMINISTRATOR OF THE ESTATE OF HAROLD G. HUGHES,

Plaintiff and Appellant,

vs.

GLENN C. FETTER and FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY, A WISCONSIN CORPORATION,

Defendants and Respondents.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF APPELLANT

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Opinion Below

The opinion of the Supreme Court of the State of Wisconsin is reported in *Hughes vs. Fetter et al*, 257 Wis. 35; 42 N.W. 2d 452.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257.

Question Presented

May a state consistently with the Full Faith and Credit Clause, Section 1, Article IV, United States Constitution,

and the Due Process Clause, Section 1, Fourteenth Amendment, United States Constitution, forbid access to its courts to enforce a cause of action for a wrongful death based upon the statutes of a sister state, where the injuries and death occurred in that other state?

Statute Involved

Section 331.03 of the Revised Statutes of the State of Wisconsin reads as follows:

> "Recovery for death by wrongul act. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state.

Statement of Facts

Harold G. Hughes, a minor, a resident of Milwaukee, Wisconsin, died on January 11, 1948, in Effingham, Illinois, as the result of injuries sustained in a collision in Effingham County, Illinois, on January 9, 1948. Decedent Hughes was riding as a passenger in the car of the defendant Fetter at the time of the accident.

The driver of the car, Glenn C. Fetter, was also a resident of Milwaukee, Wisconsin.

Corbin D. Hughes was appointed administrator of his son's estate by the County Court of Milwaukee County, Wisconsin, and commenced this action for wrongful death based on the Illinois Wrongful Death Statute, Sections 1

and 2 of Chapter 70, Smith-Hurd Illinois Annotated Statutes. Said Illinois statute provided as follows:

"WRONGFUL DEATH

"An Act requiring compensation for causing death by wrongful act, neglect or default. (Approved February 12, 1853. L. 1853, p. 97)

"1. Killing—Action survives) Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly; Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"2. Action—By whom brought—Limit of damages—Death outside State.) Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the injury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of $15,000; Provided, that every such action shall be commenced within one year after the death of such person. Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such

suit may be had upon the defendant in such place. As amended by act approved July 18, 1947."

The defendants denied negligence; later the defendants moved for summary judgment in the Circuit Court of Milwaukee County upon the sole contention that said action could not be maintained in Wisconsin because of the provision in Section 331.03 of the Wisconsin Statutes.

Plaintiff contended in the Circuit Court of Milwaukee County that this action was not brought under the Wisconsin Wrongful Death Act. (Sec. 331.03) but was brought under the Illinois statute; and that the proviso found in Section 331.03 of the Wisconsin Statutes did not prohibit the bringing of this action. The trial court sustained defendants' position and granted defendants summary judgment and dismissed the plaintiff's complaint on the merits.

The Supreme Court of the State of Wisconsin (two Justices dissenting) construed the Wisconsin statute as prohibiting access to the Wisconsin courts in enforcing an action for wrongful death based upon the statutes of Illinois, and affirmed the judgment of the trial court, summarily dismissing the plaintiff's complaint on the merits.

Summary of Argument

The historic function of the Full Faith and Credit Clause is to exert an integrating force in our federalism. For the states of the Union, the Full Faith and Credit Clause of the Federal Constitution abolished in large measure the principle of international law by which local policy may dominate the rules of comity. The room left for the play of conflicting policies is a narrow one.

The very purpose of the Full Faith and Credit Clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created

under the laws of the others, and to make them integral parts of a single nation, throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not to lightly be set aside out of deference to local policy, which, if it exists, would seem to be too trivial to merit serious consideration when weighted against the policy of the constitutional provision and the interest of the state whose judgment is challenged.

The case at bar involves a statute of Wisconsin which has been construed by its highest court as denying access to the courts of Wisconsin for the enforcement of an action for damages for wrongful death caused in another state. The Illinois statute creating such right of action is refused enforcement by the Wisconsin courts.

In the absence of any difference in judgment (public policy) between the law of the forum and the law of the state where the act or transaction took place, as to its moral quality (none exists between the statute of Wisconsin and the state of Illinois here involved), every state is required to give full faith and credit to the rights created by the statute of any other state when invoked in the forum. With respect to the laws of the sister state, involving no conflict in substantive law with the law of the forum, no state is free to disclaim responsibility for enforcing the law of such sister state. Section 1, Article IV, and Section 1 of the Fourteenth Amendment, United States Constitution, require the striking down any state statute which directs its courts to close its doors or refuse to recognize and enforce therein the statute of a sister state with relation to acts done in that sister state, especially while enforcing a similar statute with relation to similar acts done in the state of the forum.

Broderick v. Rosner (1935), 294 U. S. 629, 79 L. ed. 1100, 56 S. Ct. 489, 100 A. L. R. 1133.

The Full Faith and Credit Clause of the United States Constitution forbids Wisconsin or any other state from denying access to its courts, howsoever much it may regard such withdrawal of jurisdiction the adjective law of the state or the exercise of its right to regulate the practice and procedure of its courts. Wisconsin cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent.

Angel v. Bullington, 330 U. S. 183, 67. S. Ct. 657, 91 L. ed. 832.

The Full Faith and Credit Clause, like the Commerce Clause, has become a nationally unifying force. It altered the status of the several states (which, as independent sovereignties, would be free to ignore rights and obligations created under the laws of the others) by making each an integral part of a single nation in which rights established in any part are given nation-wide application.

Magnolia Petroleum Co. v. Hunt, 320 U. S. 430.

The cause of action for damages for wrongful death, such as was given to the plaintiff by the law of Illinois, has been characterized by Justice Cardozo as a property right. *Loucks v. Standard Oil Co.,* 224 N. Y. 99, 120 N. E. 198) For Wisconsin to refuse to enforce the property right, which the plaintiff has been given by the laws of Illinois, is to leave the plaintiff without a remedy and take away his property without due process of law. Wisconsin, in denying access to its courts to enforce a property right that the plaintiff acquired under the laws of Illinois, is in effect taking away plaintiff's property without due process of law in violation of Section 1 of the Fourteenth Amendment of the United States Constitution.

Introductory Statement

The Wisconsin Supreme Court decision here on appeal gives an admittedly new interpretation to Wisconsin's Wrongful Death Statute, Sec. 331.03; now construing this 90-year old statute to bar the enforcement in Wisconsin of a right and remedy conferred by the statutes of another state for wrongful death caused in such other state. On familiar principles, the constitutionality of Sec. 331.03 must be determined in the light of the construction placed upon it by the highest court in the State of Wisconsin.

In its decision, the Wisconsin Supreme Court says:

> "We agree with the learned trial judge that the enactment (as so construed) is not in contravention of the Full Faith and Credit Clause of the federal Constitution";

and adopts the view that *Chambers v. B. & O. Railroad Co.* (207 U. S. 142):

> "fully sustained the validity under the federal Constitution"

of a statute barring access to the forum for enforcement of a cause of action created by the statutes of another state.

Although the Wisconsin court indicates that there is sanction from this court for its decision, this court has never decided whether a state's effectuation of a policy denying enforcement to a foreign wrongful death statute is consistent with the full faith and credit obligation.

Note *64 Harv. L. Rev.* 327 (Dec. 1950).

The question thus squarely presented by the record in the case at bar is whether the federal Constitution does impose an obligation upon the courts of each state to adjudicate rights arising and claimed under the public laws of another state wherein occurred the asserted wrong or transaction;

or whether they can be relieved from this obligation by an act of the local legislature purporting to limit or deny jurisdiction; and particularly so when the same courts of the forum are, by state law, required to adjudicate rights otherwise identical arising and claimed under similar statutes of the forum.

Appellant maintains that both the Full Faith and Credit Clause (Art. IV, Sec. 1) and the Due Process Clause (Fourteenth Amendment) of our federal Constitution forbid the State to deny access to its courts for the adjudication of rights on the sole ground that those rights arose outside the forum.

I

The full faith and credit clause precludes any state in the union from denying access to its courts for the enforcement of rights created under the statutes of a sister state, especially when the forum enforces similar rights and remedies created by its own local law.

From a series of decisions of this court—more recent and more sharply focused upon the language of the Full Faith and Credit Clause than any cited in the opinions below—there emerge certain principles which require the reversal of the decision of the Wisconsin Supreme Court herein.

A. "Public acts"—Statutes—of a sister state, no less than her judgments, are within the sweeping command that full faith and credit must be given.

Broderick v. Rosner (1935), 294 U. S. 629, 642; 79 L. ed. 1100, 1107.

John Hancock Mutual Life Ins. Co. v. Yates (1936), 299 U. S. 178, 183; 81 L. ed. 106, 109.

Bradford Electric Light Co. v. Clapper (1932), 286 U. S.

145, 154-155, 76 L. ed. 1026, 1032 footnote 3, contains an exhaustive collection of authorities as far back as the Records of the Constitutional Convention, and quotes the implementing Act of Congress (of 1804). The Congressional Act has since been revised so as specifically to provide:

> "Such Acts, * * * so authenticated, shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such States, * * * from which they are taken."
>
> (Act, June 25, 1948, ch. 646, Sec. 1; 62 Stat. 947, F. C. A., Title 28, Sec. 1738)
>
> "Whatever the forum's power to refuse to enforce a cause of action based on a foreign statute, it is clear that Wisconsin could not on policy grounds have denied faith and credit to an Illinois judgment, which plaintiff could have presumably obtained by suing in Illinois. As to the full faith and credit clause, many decisions have differentiated between judgments and statutes, relying on the absence of a congressional act executing the clause as to statutes. But the 1948 revision of the Judicial Code seems to preclude such reasoning now. Even if there is justification in some situations for according a greater quantum of faith and credit to judgments than to unlitigated causes of action, it is difficult to see the practical benefits in the instant case of requiring the litigants to go into one state to get a judgment, and then to return and sue on it." Note 64 Harv. L. Rev. pp. 328, 329 (Dec. 1950)

B. As to rights governed by the statutes of a sister state, full faith and credit makes comity a constitutional duty rather than an act of grace which may be withheld at the pleasure of the state of the forum.

In 1935, in *Broderick v. Rosner*, 294 U. S. 629, 642, 79 L. ed. 1100, 1107, this Court held that the full faith and credit clause rendered nugatory a New Jersey statute, which, by imposing extremely onerous procedural difficulties, barred, for all practical purposes, enforcement in

New Jersey of personal liabilities of stockholders, created by or arising under laws of another state. The court, speaking through Justice Brandeis, set forth these principles:

> "The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard therein is subject to the limitations imposed by the Federal Constitution. * * * A *'State cannot escape its constitutional obligations (under the full faith and credit clause) by the simple device of denying jurisdiction in such cases to courts otherwise competent.'* * * * It is true that a State can legislate only with reference to its own jurisdiction, and that the full faith and credit clause does not require the enforcement of every right which has ripened into a judgment of another state or has been conferred by its statutes. But the room left for the play of conflicting policies is a narrow one.
>
> * * *
>
> "But it may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties. *For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate the rules of comity.*"

In *Angel v. Bullington* (1947), 330 U. S. 183, 188, 91 L. ed. 832, 836, this Court referred to "the subordination to the requirements of the Constitution of the power of a state to withdraw jurisdiction from its courts," and said:

> "The Contract Clause, the Full Faith and Credit Clause, the Privileges or Immunities Clause, *all fetter the freedom of a State to deny access to its courts howsoever much it may regard such withdrawal of jurisdiction, 'the adjective law of the State,'* or the exercise of its right to regulate 'the practice and procedure' of its courts * * * A State 'cannot escape its constitutional

obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent."

C. If there were a conflict between the legitimate interest of Wisconsin and the national policy of Full Faith and Credit, the relative weight of the two interests would be a question ultimately for decision by this Court.

Pink v. A. A. A. Highway Exp. (1941), 314 U. S. 201, 86 L. ed. 152, 137 A. L. R. 957, at p. 963:

> "It was the purpose of that provision to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others/ But the very nature of the Federal union of states, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others. When such conflict of interest arises it is for this Court to resolve it by determining how far the full faith and credit clause demands the qualification or denial of rights asserted under the laws of one state, that of the forum, by the public acts and judicial proceedings of another."

Williams v. State of North Carolina (1942), 317 U. S. 287, 63 S. Ct. 207, at p. 215:

> "This court, of course, is the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause."

The historic function of the Full Faith and Credit Clause is to act *as an integral force in our federalism.* The Full Faith and Credit Clause was designed to achieve uniform recognition of a litigant's rights as they would exist at the place of the transaction.

> "The full faith and credit clause like the commerce clause thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application in every part." • • •
>
> *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430, 439; 88 L. ed. 149, 155, by Chief Justice Stone.

To like effect, *Milwaukee County v. White Co.,* 296 U. S. 268; *Williams v. North Carolina,* 317 U. S. 289.

Justice Jackson of this Court, in an important address, has recalled the historic function of the Full Faith and Credit Clause as an integrating force in our federalism.

Robert H. Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Col. L. Rev. 1:

> at p. 2: "It was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states."
> at p. 17: "It serves to coordinate the administration of justice among the several independent legal systems which exist in our federation."

See also article on *Chief Justice Stone and the Conflict of Laws,* 59 Har. L. Rev. (1946), 1210, 1233.

The right which the plaintiff seeks to have enforced in Wisconsin was given by the laws of Illinois, (Record, pp. 28-29), and arises out of the negligence of respondent in the operation of an automobile within Illinois whereby the death of appellant's decedent was caused in Illinois.

D. Actually the subject matter of the litigation—recovery of damages for wrongful death caused in Illinois—is such that no other state can be said to have any countervailing interest. What the highest court of Wisconsin calls "public policy" is simply a refusal, out of indifference, to give access to its courts for the enforcement of a public law of a sister state.

Wisconsin's Sec. 331.03, after language substantially reenacting the provisions of Lord Campbell's Act, concludes simply: "provided that such action shall be brought for a wrongful death caused in this state." It is in this last proviso that the Wisconsin Supreme Court now finds an assertion of "public policy" against enforcing the Illinois-created right of action.

Although appellant had supposed this proviso to be a mere restriction upon extraterritorial operation of the Wisconsin-created cause of action (a precaution understandable in view of the confusion in the law of Conflicts as it existed in 1857, when this statute was first enacted, although redundant in our times), we must assume here that the statute really says what the Wisconsin Supreme Court now says it means: "That no action shall be brought in Wisconsin for a wrongful death caused in any other state."

Attaching the label of "public policy" does not alter its character as a mere assertion of local inertia or indifference with respect to enforcement of rights originating outside the state; and that there is no genuine Wisconsin interest or "public policy" in any proper sense, to be weighed against the national policy of Full Faith and Credit.

The Wisconsin court's conclusion:

"* * * that public policy required (the result below)

is questionable. The Wisconsin statute might be construed as declaring the general conflict rule that the wrongful death statute of the jurisdiction where the death is caused governs, rather than as manifesting a legislative policy against enforcement of such foreign statutes. Wisconsin's own death statute indicates that the state does not consider the enforcement of such liability offensive to public morals; and a willingness to entertain a tort action based on the instant facts if the injury had not been fatal indicates the absence of a general policy against enforcing rights which arose outside the state. See *Buckeye v. Buckeye,* 203 Wis. 248, 234 N. W. 342 (1931)."

Note 64 Harv. L. Rev. 329 (Dec. 1950).

The present volume of interstate travel by automobile and the incidence of frequently fatal injury therein point up the importance of Wisconsin's denial of enforcement to rights and duties arising in interstate travel; and the frequency of litigation with respect to such rights emphasizes the effect of Wisconsin's indifference as against the national interest represented by the Full Faith and Credit Clause.

While the local indifference here assailed involves torts causing death, the principle involved applies to all torts and, indeed, to all transactions occurring outside the forum wherein a remedy is sought.

The situation at bar is exactly the same as if suit were brought on a note executed in New York by a New York resident, who later moved to Wisconsin. If the State of Wisconsin could say that it would not enforce in Wisconsin the note executed in New York, Wisconsin would wreck the interstate commerce provision of the Constitution. The Constitution so interpreted would then put it in power of each of the states to make an asylum for those who seek to avoid their just obligations.

The assertion of the judicial power by a state is some-

thing that the state cannot withhold or give at its unbridled pleasure—the Due Process Clause forbids it. The Full Faith and Credit Clause intends and insists that it should be affirmatively exercised.

Wisconsin can have no legitimate interest in establishing a refuge, against civil liabilities imposed by a sister state, for a person whose negligence has caused death of a human being.

The national interest of the case at bar so strongly preponderates against any alleged interest that Wisconsin may have that this court should direct that the wall of insulation set up by Wisconsin be torn down because of the command of the federal Constitution. The vice of the decision below is that it absolutely nullifies the Full Faith and Credit Provision of the United States Constitution.

In *Milwaukee County v. M. E. White Co.* (1935), 296 U. S. 269, 276-277, 80 L. ed. 220, 228, this court states:

> "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created *inder the laws* or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy of a just obligation might be demanded as of right, irrespective of the state of its origin. *That purpose ought not lightly to be set aside out of deference to local policy, which, if it exists, would seem to be too trivial to merit serious consideration when weighted against the policy of the constitutional provision and the interest of the state whose judgment is challenged.* In the circumstances disclosed here no state can be said to have a legitimate policy against payment of its neighbor's taxes, and the obligation of which has been judicially established by courts to whose judgments in practically every other instance it must give full faith and credit. Compare *Fauntleroy v. Lum*, 210 U. S. 230, 52 L. ed. 1039, 28 S. Ct. 641."

Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 1108:

> "Obviously recognition could not be accorded to a local policy of New Jersey, if there really were one, of enabling all residents of the State to escape from the performance of a voluntarily assumed statutory obligation, consistent with morality, to contribute to the payment of the depositors of a bank of another state of which they were stockholders."

The negligence and death caused thereby took place in Illinois; the consequences that flowered therefrom were, under elementary principles of Conflicts—private international law—peculiarly within the regulatory power of Illinois.

> *Restatement, Conflict of Laws*, Sec. 392; *Beale, The Conflict of Laws*, Vol. 2, p. 1307, Sec. 391.1.

"So much so," it was said in *Converse v. Hamilton*, 224 U. S. 243, 260; 56 L. ed. 749, 756, holding that Wisconsin must give full faith and credit to a Minnesota statute permitting suit by a Minnesota receiver, "that no other state properly can be said to have any public policy thereon."

The enforcement of a statutory right to collect assessments on behalf of defunct banks, or of taxes on behalf of a municipality, stands on no higher footing, and is not more entitled to Constitutional protection than the statutory right to recover damages for the wrongful death of a human being, conferred by the state wherein the wrong and the death occurred.

In this case we are not confronted with the difficulty that arises when the forum is asked to enforce rights conferred by the laws of other states, but arising out of transactions that would be condemned and treated as nugatory if they had occurred within the state. In such cases it may be hard

to compel the forum to give legal effect to what its statutes, its judges and its people may regard as immoral. No danger of compelling moral stultification is even remotely involved here. Wisconsin has no public policy that is against collecting damages for negligent homicide. On the contrary, with respect to deaths wrongfully caused within its borders, Wisconsin was one of the first of the states to modify the common law and to provide (in 1857) a statutory cause of action for wrongful death, modeled after Lord Campbell's Act. Until this case was decided, the Wisconsin courts for many years enforced wrongful death statutes of other states unaware of the "public policy" now found to lurk in her own.

In *Bain v. Northern Pacific Railroad Co.* (1904), 120 Wis. 412, 98 N. W. 241, the Wisconsin court permitted suit in Wisconsin on a Minnesota statute for death occurring in Minnesota (and the proviso in Sec. 331.03 was the same then as now). The Wisconsin court stated as follows, at p. 419:

> "So restricted, it presents no obstacle to the present action, depending on statutes of Minnesota of which practical counterparts exist here, and which therefore are *entirely in accordance with the public policy of Wisconsin as declared by its legislature.*"

And see *Sheehan v. Lewis* (1935), 218 Wis. 588, 593, 260 N. W. 633, where the Wisconsin court permitted suit to be brought in Wisconsin to enforce the Illinois Wrongful Death Statute.

The Wisconsin statute creates, for deaths caused in Wisconsin, the same right of action that the Illinois statute gives for deaths caused in that state.

Wisconsin has no policy or interest, other than mere indifference, to be weighed against the commands of full faith and credit; and indifference is not self-justifying.

While a state may refuse to entertain an action on a foreign statute, where it is an inconvenient forum, this ground is precluded in the case at bar by the Wisconsin residency of the litigants and the decedents.

It is clear that the aim of Wisconsin is retaliation against Illinois because of the language of the Illinois statute. Retaliation is, of course, an insufficient ground to justify denial of faith and credit to the Illinois statute.

II

Under the due process clause no state may refuse to enforce a right of action upon the sole ground that such right arose outside that state.

Wisconsin's statute, Sec. 331.03, as construed by its Supreme Court, is repugnant to United States Constitution, Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty or property, without due process of law." If the command of the Constitution is not so all inclusive, then may not Wisconsin or any other state deny access to its courts to one who seeks redress for any kind of injury caused by any kind of tort—whether to person or property—simply because the wrongful act was committed outside its borders? If it may, may it not also refuse to enforce any rights acquired under contract made in another state and governed by the laws of that state; why may not the state of the forum refuse to enforce a right in property taken from its owner in another state and brought into the forum, simply because that right arose in another state?

The effect of the decision below is to refuse plaintiff access to the Wisconsin courts to enforce a property right given to him by the laws of Illinois; it leaves plaintiff

without a remedy and takes his property away without due process of law. The impact of the decision below is to "balkanize" the states and permit each state to isolate itself from the rest of the Union by disclaiming interest in the protection of any and all rights originating in acts or transactions occurring outside its borders.

Appellant administrator contends that he was given a *property right* by the public laws of Illinois; that under the due process clause, as well as under the full faith and credit clause of the United States Constitution, Wisconsin may not refuse enforcement in its courts of such right.

A strong sense of the necessity of recognizing rights originating in sister states underlies decisions which stress the mandatory character of comity, even apart from constitutional requirements.

> *"There is a strong public policy favoring the enforcement of duties validly created by the law governing their creation. Denial of the enforcement of the foreign claim will result in an undeserved benefit to the defendant."*
>
> *A. L. I. Restatement, Conflict of Laws,* Sec. 612, Comment e; see *Beach, Uniform Interstate Enforcement of Vested Rights* (1918), 27 Yale L. Jour. 656.

Recognition of foreign law is sometimes based on a theory known as the vested rights theory, which conceives of rights based on such law as property and to be protected within the limits of the policy of the forum. 15 C. J. S., *Conflict of Laws,* Sec. 3, p. 840.

The clearest statement on the subject, however, is that made by Justice Cardozo, speaking for the New York Court of Appeals, in *Loucks v. Standard Oil Co.* (1918), 224 N. Y. 99, 120 N. E. 198, 201. The sole question before the New York court was whether a Massachusetts statute governing

death caused in that state ought to be enforced by the courts of New York.

"A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, 'follows the person and may be enforced wherever the person may be found.' * * * 'it is a principle of every civilized law that vested rights shall be protected.' * * * The plaintiff owns something, and we help him to get it. * * * 'The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there.' * * *

"If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare.

"Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. *A right of action is property.* If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. * * * Similarity of legislation has indeed that importance; its presence shows beyond question that the foreign statute does not offend the local policy. * * * The misleading word 'comity' has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles. * * *

"* * * there is nothing in the Massachusetts statute that outrages the public policy of New York. * * * The fundamental policy is that there shall be some atonement for the wrong. * * * It cannot be that public policy forbids our courts to help in collecting what belongs to them. * * *

"We hold, then, that public policy does not prohibit the assumption of jurisdiction by our courts, and that this being so, mere differences of remedy do not count. * * * We must apply the same rules that are applicable to other torts; and the tendency of those rules today is toward a larger comity, if we must cling to the traditional term. * * *

> *" * * * The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained. At least, that is so among the states of the Union. * * * There is a growing conviction that only exceptional circumstances should lead one of the states to refuse to enforce a right acquired in another. The evidences of this tendency are many."* (emphasis added)

To the same effect is *Curtis v. Campbell* (C. C. A. Pa. 1935), 76 F. 2d 84, 85 (certiorari denied, 295 U. S. 737, 79 L. ed. 1685) where the court pointed out that a right of action given by a foreign death statute is a property right that ought to be protected.

The court of appeals continued, at p. 851 of 74 F. 2d 849, saying:

> "There is a marked difference between public policy —something that affects 'good morals or natural justice,' or the 'general interest of the people of the state,' justifying refusal to enforce a foreign right of action— and mere difference in state laws with respect to a particular subject."

The standard of morality and justice which Wisconsin *sets for itself* not only permits but requires its courts to try actions for wrongful death caused within its borders. Sec. 331.03, *Wis. Stats.* How can it be immoral or unjust—by that very standard—to try such actions for wrongful death caused outside its borders?

III

The authorities principally relied upon in the decisions below are readily distinguishable.

The opinion both of the Wisconsin Supreme Court and of the trial court lean heavily on *Dougherty v. American*

McKenna Process Co., 255 Ill. 369, 99 N. E. 619, L. R. A. 1915 F. 955, which, in turn, relies on:

> *Paul v. Virginia*, 8 Wall, 168, 19 L. ed. 357; and *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. ed. 143.

The decision of the Illinois Supreme Court in the *Dougherty Case* was never appealed to or discussed in this court. However, the *Dougherty Case* was among those cited to this Court by counsel for appellee in *Broderick v. Rosner*, 294 U. S. 629, 79 L. ed. 1100, 1103, for the contention that:

> "The full faith and credit clause of the Constitution of the United States does not compel a state to open and lend its courts to the prosecution of a suit based upon a cause of action created by the statutes of another state."

This court, in *Broderick v. Rosner*, without referring to the *Dougherty Case* decision, repudiated that contention and reached a conclusion directly opposed to *Dougherty*.

Except that it is the mainstay of the decisions below and the chief source of their citations, *Dougherty* would not merit even this much discussion. Its fallacy is manifest, but the courts below could not be dissuaded from the same error, namely—confusion between: (a) the giving of extra-territorial effect to a state statute, and (b) the application by the forum of the law of the place where the operative facts or transactions took place.

The existence of this confusion is demonstrated by the extensive reliance on the *Dougherty Case* (carried over into the opinions below in this case) upon *Paul v. Virginia* (1868), 8 Wall, 168, 19 L. ed. 357. Paul, as agent for several insurance companies incorporated in New York, was indicted in Virginia for issuing insurance policies in Virginia without having obtained a license as required by

Virginia. This Court, 19 L. ed. (8 Wall.) at p. 360, held that the laws of the state of incorporation cannot determine the rights or duties of the corporation arising from the acts of its agents *in Virginia*. This is a very different proposition from holding that Virginia is not obligated to apply New York law with respect to acts or transactions that took place *in New York;* and *Paul v. Virginia* did not so hold.

Chambers v. Baltimore & Ohio Railroad Co., 207 U. S. 142, 28 S. Ct. 34, 52 L. ed. 143, is also relied on by the courts below. *Chambers* discussed only the Privileges and Immunities Clause.

Broderick v. Rosner, 294 U. S. 629, 79 L. ed. 1100, 1107, footnote 3 of the opinion states:

> "*Chambers v. Baltimore & Ohio Railroad Co.*, 207 U. S. 142, 52 L. ed. 143, 28 S. Ct. 34, is not to the contrary; there no claim was made under the full faith and credit clause."

An appendix follows the Conclusion listing other authorities analyzing aspects of the problem before this Court for review.

Conclusion

It is submitted that Sec. 331.03 of the Wisconsin Statutes, as construed by the Supreme Court of the State of Wisconsin, fails to give full faith and credit to the public laws of a sister state in violation of Sec. 1, Article IV, of the United States Constitution. Wisconsin, in denying access to its courts in enforcing a property right that the plaintiff acquired under the laws of Illinois, is, effect, taking away the plaintiff's property without due process of law in violation of Sec. 1 of the Fourteenth Amendment of the United States Constitution. This Court should strike down and

hold invalid Sec. 331.03 of the Wisconsin Statutes as construed by its highest court.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,
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APPENDIX

While there is a paucity of judicial authorities directly on point on the subject matter involved, legal scholars and writers have analytically reviewed many aspects of the problem and their writing bear evidence of careful investigation.

1. The proceedings with reference to the adoption of Sec. 1, Article IV, U. S. Const., are set forth in *2 Farrand, The Records of the Federal Convention* (1911), 188, 447-448, 484-486, 488-489, reviewed and commented upon in *Cook, The Logical and Legal Bases of the Conflict of Laws* (1942) 90; *Costigan, The History of the Adoption of Section 1 of Article IV* (1904), 4 Col. L. Rev. 470. See also note, 38 Harv. L. Rev. 805.

2. The individual courts of a federated union often find that their own local policies must frequently give way to broader national interests. *Dodd, State Government,* (2d ed.) (1918) 134. *Dodd, The Power of the Supreme Court to Review State Court Decisions in the Field of Conflict of Laws* (1926), 39 Har. L. Rev. 532. *Annotation on Federal Constitution and Conflict of Laws as to Rights Not Based on Judgments,* 134 A. L. R. 1472. *Lorenzen, Territorially, Public Policy and the Conflict of Laws* (1924), 33 Yale L. Jour. 750. *Cavers, A Critique of the Choice-of-Law Problem,* 47 Harv. L. Rev. 173.

3. As early as 1908, Professor Schofield had urged that the Due Process clause ought to protect against all error in state decisions, not only in the field of conflicts but in any sort of case, on purely domestic facts, so that any erroneous state decision would be reversible by this court. *Schofield, The Supreme Court of the United States and the Enforcement of State Law by the State Courts* (1908), 3

Ill. Law Rev. 195. *G. W. C. Ross, in his article Has the Conflict of Laws become a Branch of Constitutional Law?* (1931), 15 Minn. L. Rev. 161, 166, states that it would probably be fortunate if this court adopted Professor Schofield's position. See also the *Due Process and Full Faith and Credit Clauses as applied to the Conflict of Laws* (1917), 26 Yale L. Jour. 405; *Beach, Uniform Interstate Enforcement of Vested Rights* (1918), 27 Yale L. Jour. 656; *Langmaid, The Full Faith and Credit Required for Public Acts* (1929), 24, Ill. L. Rev. 383.

In this case appellant's case does not require so advanced a position. Here it is the statute of the forum which the Wisconsin court construes to be a bar to its doors against enforcement therein of a right given by an Illinois statute, for which the federal Constitution requires full faith and credit.

4. On the proper concept of "public policy" as against the "closed door," see (1) *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198; (2) *Coster v. Coster*, 289 N. Y. 438, 46 N. E. (2d) 509, 146 A. L. R. 702; (3) *In re McCurdy's Estate*, 303 Pa. 453, 154 Atl. 707; (4) *Biewend v. Biewend*, 17 Cal. (2d) 117, 109 Pac. (2d) 701, 132 A. L. R. 1265; 15 C. J. S. *Conflict of Laws*, Sec. 4, p. 854; *Restatement of the Law, Conflict of Laws*, Sec. 612, pp. 731-732.

5. It has been suggested that since the public policy asserted is usually unrelated to public morals or substantial justice, excluding actions on grounds of public policy should never be permitted: See: *Goodrich, Foreign Facts and Local Fancies*, 25 Va. L. Rev. 26 (1938); *Beach, Uniform Interstate Enforcement of Vested Rights*, 27 Yale L. Rev. 656 (1918).

6. To the proposition that a cause of action for wrongful

death given by the statutory laws of a sister state is a vested right that should be enforced by the courts of all other states, see (1) *Goodrich, Conflict of Laws*, Sec. 102 (1949); (2) *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198; (3) *Curtis v. Campbell* (C. C. A. Pa. 1935), 76 F. (2d) 84.